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 SOLOMON, GRINDLE, SILVERMAN & WINTRINGER, APC

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA

Cathy Sandoval Garcia,	)	Case No: '11CV1805 DMS BLM
)	
Plaintiff,	)	MEMORANDUM OF POINTS AND
	)	AUTHORITIES IN SUPPORT OF
v.	)	DEFENDANTS' MOTION TO DISMISS
	)	OR, IN THE ALTERNATIVE, TO
Solomon, Grindle, Silverman & Wintringer	)	STRIKE PORTIONS OF FIRST
APC, and Cabrillo Credit Union,	)	AMENDED COMPLAINT
)	
Defendants.	)	[FRCP 12(b)(1) and (6) & 12(f)]
)	
	)	<u>Hearing:</u>
	)	Date: January 13, 2012
	)	Time: 1:30 p.m.
	)	Dept.: 10
	)	Judge: Honorable Dana M. Sabraw

I. MOTION

Defendants CABRILLO CREDIT UNION's ("CABRILLO") and SOLOMON, GRINDLE, SILVERMAN & WINTRINGER, APC's ("SGSW") motion is brought in response to the First Amended Complaint ("FAC") filed by Plaintiff on October 12, 2011. CABRILLO and SGSW are sometimes collectively referred to herein as "Defendants." In the FAC, Plaintiff asserts two causes of action: Violation of the Fair Debt Collection Practices Act (FDCPA) (First Cause of Action) and; Violation of the Rosenthal Fair Debt Collection Practices Act (Rosenthal Act) (Second Cause of Action), which is entirely a State law claim.

As discussed in greater detail below, Plaintiff's claims against Defendants fail as a matter of law for the following specific reasons:

- 1 1. Plaintiff's first cause of action as to CABRILLO is barred by 15 U.S.C. §1692a;
- 2 2. Plaintiff's causes of action fail to state a claim upon which relief can be granted as against
- 3 either CABRILLO or SGSW;
- 4 3. Plaintiff's second cause of action is barred by applicable state law; and
- 5 4. The Court lacks subject-matter jurisdiction over the State law claims asserted in the second
- 6 cause of action.

7 Based on the foregoing, and pursuant to the points and authorities which follow, Defendants
 8 submit that the motion to dismiss or, in the alternative, to strike portions of Plaintiff's FAC should be
 9 granted and that Plaintiff's pending FAC against Defendants should be dismissed without leave to
 10 amend.

11 **II. MEMORANDUM OF POINTS AND AUTHORITIES**

12 **A. Authority for Motion to Dismiss.**

13 Defendants' motion to dismiss is made pursuant to Rule 12(b)(1) and (6) of the Federal Rules of
 14 Civil Procedure ("FRCP"). FRCP Rule 12(b) provides in relevant part:

15 Every defense to a claim for relief in any pleading must be asserted in the
 16 responsive pleading if one is required. But a party may assert the following
 defenses by motion: . . .

17 (1) lack of subject-matter jurisdiction;

18 . . .

19 (6) failure to state a claim upon which relief can be granted; . . .

20 Defendants' motion to strike is made pursuant to Rule 12(f) of the FRCP. FRCP Rule 12(f)
 21 states in relevant part:

22 The court may strike from a pleading an insufficient defense or any redundant,
 23 immaterial, impertinent, or scandalous matter. The court may act:

24 (1) on its own; or

25 (2) on motion made by a party ...

26 Finally, FRCP 7012(g)(1) specifically allows a motion to dismiss and a motion to strike to be
 27 joined in the same motion. Accordingly, statutory authority exists for Defendants' motion to dismiss or,
 28 in the alternative, to strike portions of Plaintiff's FAC against Defendants.

1 **B. Plaintiff's First Cause of Action as against CABRILLO is barred by 15 U.S.C. § 1692a.**

2 The FAC appears to admit that CABRILLO is not a debt collector under the FDCPA. *See* FAC,
 3 Page 3, Paragraph 18. However, elsewhere in the FAC, Plaintiff attempts to “boot strap” liability against
 4 CABRILLO under the FDCPA based on the allegations against CABRILLO’s counsel, Solomon,
 5 Grindle, Silverman & Wintringer, APC, also a named defendant in the FAC. *See* FAC, Page 6,
 6 Paragraph 36. Therefore, despite the admission by Plaintiff that CABRILLO is not liable under the
 7 FDCPA, Plaintiff continues to seek liability against CABRILLO under the FDCPA based on misplaced
 8 arguments of agency. If the Court were to allow such allegations to stand, then the exclusion provided
 9 by the FDCPA to creditors seeking recovery of their own debts would be eviscerated and essentially of
 10 no force and effect. Such is not the state of the law. However, based on these allegations and Plaintiff’s
 11 attempt to still strap CABRILLO with liability under the FDCPA, CABRILLO is compelled to address
 12 the FDCPA allegations fully below.

13 CABRILLO is not a “debt collector” under the FDCPA and therefore, the First Cause of Action
 14 for violation of the FDCPA is barred as to CABRILLO. 15 U.S.C. § 1692a sets forth certain definitions
 15 concerning the FDCPA and states in relevant part as follows:

16 (6) The term “debt collector” means any person who uses any
 17 instrumentality of interstate commerce or the mails in any business the
 18 principal purpose of which is the collection of any debts, or who regularly
 collects or attempts to collect, directly or indirectly, debts owed or due or
 asserted to be owed or due another. [Emphasis added].

19 15 U.S.C. §1692a(6); *see also Garcia v. Wachovia Mortgage Corporation* (2009 USDC, CD) 676
 20 F.Supp.2d 895, 910. The debt attempting to be collected from Plaintiff which forms the basis of the
 21 claims asserted in the first cause of action against CABRILLO is clearly being collected by CABRILLO,
 22 the original creditor. Therefore, CABRILLO is not a “debt collector” and not subject to the FDCPA.

23 Therefore, the First Cause of Action for violation of the FDCPA is barred as to CABRILLO and
 24 dismissal is appropriate without leave to amend. Alternatively, all allegations as against CABRILLO
 25 regarding any violation of the FDCPA must be stricken.

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27 ///

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C. Plaintiff's First Cause of Action for Violation of FDCPA fails to state a claim upon which relief can be granted as against Defendants, or either of them.

As set forth above, the FDCPA does not even apply to CABRILLO and therefore, dismissal is appropriate. However, the First Cause of Action also fails as to Defendants on additional grounds. Plaintiff's FAC appears to intermix the FDCPA requirements and State law requirements. At a minimum, this makes the entire FAC vague, ambiguous and confusing, making yet a separate ground for dismissal. However, the two sets of laws are not identical. When read carefully, and despite Plaintiff's attempt to confuse the reader, there are just two violations alleged: 1) Violation of 15 U.S.C. §1692g (FDCPA); and 2) Violation of California Civil Code §1812.700 (Rosenthal Act). That is the extent of the two alleged violations, both of which are related to one letter sent to Plaintiff.

Plaintiff's sole complaint concerns a letter dated April 4, 2011 ("Letter") (wrongfully identified in the FAC as April 4, 2010). *See* FAC, Page 4, Paragraph 24, Lines 18 - 19. Plaintiff admits receiving the Letter. *See* FAC, Page 4, Paragraph 25, Line 20. A copy of the Letter is attached and marked as Exhibit "A" to the FAC. CABRILLO is the original creditor of the debt in question. The Letter contains all the applicable provisions set forth in 15 U.S.C. §1692g(a). While the Rosenthal Act (State law only) has additional language allegedly required in certain debt collection letters, the only provisions relevant to the FDCPA violations are those in Section 1692(g). This issue, in fact, was directly dealt with by the United States District Court, Southern District of California, in the case of *Khosroabadi v. North Shore Agency* (2006 USDC, SD, CA) 439 F.Supp.2d 1118.¹

In *Khosroabadi*, defendant filed a motion for summary judgment on the ground that the FDCPA did not require additional language required under the State law Rosenthal Act and therefore, the letter in question did not violate the FDCPA. The motion for summary judgment was granted and the court therein held that the letter provided complied with the FDCPA. *See Khosroabadi v. North Shore Agency* (2006 USDC, SD, CA) 439 F.Supp.2d 1118, 1123 - 1124. The court further held in *Khosroabadi* that the "letter informed Plaintiff that she could have contested the debt or requested more information about the debt or her creditor. Reading Defendant's letter from the standpoint of a least sophisticated debtor,

¹ Defendants notes that Plaintiff's counsel herein was also the Plaintiff's counsel in *Khosroabadi* wherein summary judgment was granted in favor of defendant on a case that seems almost directly on point and similar to this case.

1 the Court concludes that it was not was [sic] false, deceptive, or misleading.” *Id.* at 1124. The court
 2 further found that the plaintiff did not set forth any information to show that the letter actually misled or
 3 deceived her. *Id.*

4 The facts herein are eerily similar. Clearly, the Court can review the Letter and find that it
 5 complies with Section 1692g(a) as a matter of law. There is nothing confusing about the Letter and
 6 Plaintiff’s claims to the contrary are meritless. Plaintiff took absolutely no action on the Letter at the
 7 time it was sent, made no contact with either CABRILLO or SGSW in response to the Letter, until
 8 Plaintiff filed the original complaint herein, over four (4) months later, and only after CABRILLO
 9 commenced a State Court Action against Plaintiff to collect the debt, which action is currently pending
 10 in the Superior Court, County of San Diego, Case No. 37-2011-00076999-CU-BC-SC (“State Court
 11 Action.”) The Letter certainly alerted the Plaintiff to the fact that she needed to make contact within the
 12 30 days or the debt would be deemed valid. All information required was in the initial Letter.
 13 Therefore, no further letter was required within five days of the Letter as alleged in the FAC. *See* FAC,
 14 Pages 4 - 5, Paragraph 28; *see also* 15 U.S.C. §1692(g)(a).

15 Based on the foregoing, Defendants respectfully request that the Motion to Dismiss be granted
 16 without leave to amend on the ground that the First Cause of Action fails to state a claim upon which
 17 relief can be granted. Alternatively, Defendants request that the matters in the First Cause of Action be
 18 stricken as to Defendants.

19 **D. Plaintiff’s Second Cause of Action for Violation of the Rosenthal Act fails for lack of**
 20 **subject-matter jurisdiction and fails to state a claim upon which relief can be granted.**

21 **1. Lack of Subject Matter Jurisdiction.**

22 Since Defendants have made a compelling argument that the First Cause of Action must be
 23 dismissed, as set forth herein, with the dismissal of the First Cause of Action, the Court should decline to
 24 retain the action since the only remaining cause of action is based solely on a State law claim under the
 25 Rosenthal Act. Therefore, dismissal of the Second Cause of Action is appropriate for lack of subject
 26 matter jurisdiction pursuant to Rule 12(b)(1). In fact, this is exactly the action the court in *Khosroabadi*
 27 took once it granted summary judgment on the FDCPA claim. The court ruled that “[a] district court
 28 should dismiss a supplemental state law claim where all of the claims over which it had original

jurisdiction have been dismissed.” [Citations omitted]. *Id.* at 1125. The same holds true in this case and therefore, Defendants respectfully request that the Court dismiss the Second Cause of Action for lack of subject matter jurisdiction.

2. Second Cause of Action fails to state a claim upon which relief can be granted.

Furthermore, the Second Cause of Action fails to state a claim upon which relief can be granted. Specifically, California Civil Code section 1788.30(d) states:

A debt collector shall have no civil liability under this title if, within 15 days either after discovering a violation which is able to be cured, or after the receipt of a written notice of such violation, the debt collector notifies the debtor of the violation, and makes whatever adjustments or corrections are necessary to cure the violation with respect to the debtor. [Emphasis added].

Cal. Civ. Code §1788.30(d). This provision provides the ability for a debt collector to cure any alleged violation under the Rosenthal Act within a certain time period. CABRILLO was notified of an alleged violation of the Rosenthal Act for the first time when served with the Complaint herein. CABRILLO was served on September 7, 2011. On September 21, 2011, within 15 days of receipt of the Complaint, CABRILLO caused its attorney to send a revised letter (hereinafter referred to as the “Curative Letter”) correcting the alleged violation as set forth in the Complaint, which are the same allegations as set forth in the FAC.² Defendants request that the Court take judicial notice of the Curative Letter pursuant to Rule 201 of the Federal Rules of Evidence (“FRE”). A copy of the Curative Letter is attached to the Request for Judicial Notice (“RJN”) filed herewith as Exhibit “A”. The letter was received by Plaintiff per a response letter from Plaintiff’s attorney dated September 21, 2011 (“Response Letter”).

Defendants request that the Court take judicial notice of the Response Letter pursuant to Rule 201 of the FRE. A copy of the Response Letter is attached to the RJN as Exhibit “B.” The Court may consider the Curative Letter and Response Letter in ruling on the Motion to Dismiss. In *Garcia v. Wachovia Mortgage Corporation, supra*, the court specifically dealt with this issue. The court ruled:

A “court may [also] consider evidence on which the complaint ‘necessarily relies’ if: (1) the complaint refers to the document; (2) the document is central to the plaintiff’s claim; and (3) no party questions the authenticity

² Defendants clearly dispute there was any violation, but undertook to correct any alleged violation as was their right by statute to do.

of the copy attached to the 12(b)(6) motion.” [Citation omitted]. A court may treat such a document as “part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6). [Citation omitted]. Such consideration prevents “plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting reference to documents upon which their claims are based.” [Citation omitted]. . . .

Moreover, “judicial notice may be taken of a fact to show that a complaint does not state a cause of action.” [Citations omitted].

Garcia, supra, at 900. All of the above-referenced letters are key facts relevant to Plaintiff’s claims and Defendants’ defenses and relevant to show that the Plaintiff cannot state a cause of action pursuant to State law. All three letters should be considered by the Court to prevent a miscarriage of justice and a waste of judicial resources in allowing this case to proceed past this Motion to Dismiss. Therefore, even if this Court were to preliminarily find that there was a violation or at least a violation was properly pled, Defendants timely cured any alleged violation pursuant to Civil Code section 1788.30(d). Based on the foregoing, ***no civil liability*** exists under the Second Cause of Action and it too, should be dismissed without leave to amend for failure to state a claim upon which relief can be granted. Alternatively, all allegations regarding any violations of the Rosenthal Act must be stricken as to Defendants.

III. CONCLUSION

WHEREFORE, CABRILLO and SGSW respectfully request that this Court grant the within motion to dismiss without leave to amend or, in the alternative, to strike portions of Plaintiff’s FAC as set forth herein. Plaintiff has already amended the complaint once after CABRILLO filed a Motion to Dismiss as to the Complaint. *See Garcia v. Wachovia Mortgage Corporation, supra*, at 900 [“Where the plaintiff has previously filed an amended complaint, . . . , the district court’s discretion to deny leave to amend is ‘particularly broad.’”] If Plaintiff could have cured the deficiencies alleged in the prior motion to dismiss, she presumably would have done so in the FAC. Plaintiff should not be given another opportunity to amend.

CABRILLO and SGSW further pray for Judgment against Plaintiff as follows:

1. For dismissal of Plaintiff’s FAC, in its entirety, against Defendants without leave to amend or alternatively, striking all allegations as against Defendants;

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1 2. For attorneys' fees and costs incurred by Defendants in connection with this
2 motion; and

3 3. For such other and further relief as this Court may deem just and proper.

4 Dated: October 26, 2011

SOLOMON, GRINDLE, SILVERMAN
& WINTRINGER, a Professional
Corporation

7 By: /s/ Holly J. Nolan
8 Timothy J. Silverman
Holly J. Nolan
9 Attorneys for Defendants
10 CABRILLO CREDIT UNION and
SOLOMON, GRINDLE, SILVERMAN &
WINTRINGER, APC